PETITION FOR REHEARING; SUGGESTION FOR REHEARING *EN BANC*

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ARGUMENT (Pages 4-9)

I. IT IS APPROPRIATE TO HAVE AN EN BANC REVIEW OF THIS COURT'S POLICY OF REFUSING TO CONSIDER ISSUES NOT RAISED IN THE OPENING BRIEF, BECAUSE UNDER THE CIRCUMSTANCES OF THIS CASE, THE APPLICATION OF THAT RULE DENIES CHAMBERS AND MANY OTHER CRIMINAL APPELLANTS SIMILARLY SITUATED DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS

Chambers timely filed his Opening Brief in this case on or about April 13, 2004. In that brief, he argued that the court improperly denied a downward departure based upon a number of personal characteristics of the defendant, the district court having concluded:

> "Well, you know, the guidelines don't ask us to look at whether or not the person is outside the heartland of the guidelines; and that is one of the problems with the guidelines, which is that the more complex the individual is who is before the court, the less adequate the guidelines are to address what the appropriate punishment might be." TR 12-5-2003, page 93, lines 18-24; AOB, page 45.

Approximately two months later, on June 24, 2004, the United States Supreme Court decided *Blakely v. Washington*, __ U.S. ___, 124 S.Ct. 253 (2004).

One week later, Chambers sought leave to supplement his original brief, or to file a new brief on this issue. Because the motion had not been ruled upon by the time of the filing of the Reply Brief, on or about July 22, 2004, the issue was included as an argument in that brief.

Subsequently, the court struck this portion of the brief.

Following the Supreme Court's decision in *United States v. Booker*, 543 U.S. ____ (2005) on January 12, 2005, Chambers filed additional motions for supplemental briefing. The panel opinion rejected these motions in footnote 3 based upon this court's rule that it will not consider issues which were not raised in the initial brief.

This "initial brief" rule appears never to have been subjected to *en banc* review, although it has been the topic of discussion and disagreement in cases in which *en banc* review was denied.

For example, in *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) on denial of *en banc*, previous opinion 242 F.3d 989 (11th Cir. 2001) the decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) was raised in a Petition for Rehearing which was denied. The matter was vacated and remanded by the United States Supreme Court, leading to a reinstatement of the earlier decision in *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001). A suggestion for rehearing *en banc* was then denied. *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Four judges concurred in the denial [Judges Carnes, Black, Hull and Marcus), while two dissented (Judges

Tjoflat and Barkett).

Similarly in *United States v. Ford*, 270 F.3d 1346 (11th Cir. 2001) *Apprendi* was raised in a Petition for Rehearing which was denied. The Supreme Court vacated and remanded. The original result was reinstated pursuant to the initial brief rule.

The *Apprendi* issues were put to rest by this court, finally, in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001), which found Apprendi inapplicable to sentencing guidelines.

A similar fate has befallen defendants attempting to raise Blakely.

In *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) on denial of *en banc*, previous opinion 379 F.3d 1241 (11th Cir. 2004), *Blakely* was raised in a Petition for Rehearing. The matter was vacated and remanded by the Supreme Court, and the original decision was reinstated. On this occasion, the denial of the *en banc* suggestion led again to four concurring judges [Judges Carnes, Hull, Anderson and Pryor], and two dissenters [Judges Tjoflat and Wilson]. Similar results have occurred in other cases, including *United States v. Pipkins*, 278 F.3d 1281 (11th Cir. 2004), reinstated ___ F.3d ___, No. 02-14306 (11th Cir., June 20, 2005).

Application of this rule to individuals such as Chambers raises serious due process and equal protection concerns.

Many of these issues are discussed at length by Judge Tjoflat in his dissents from denial of *en banc* review in the above cases. Because of page limitations, they obviously cannot be belabored here. It is Chambers' position, as expressed in his previous filings with this court, however, that

it is the intention of the Supreme Court to make *Booker* applicable to all cases now on appeal. It is particularly abhorrent that Chambers may be suffering under an illegal sentence which, because of its length [188 months] and his age [64] may well be a life sentence. He has been denied a substantive constitutional protection by the application of a procedural rule. He, like others similarly situated, is therefore deprived of due process.

The equal protection claims are equally compelling. In terms of the right to have this issue heard, how is Chambers rationally differentiated from an identical litigant whose opening brief was filed approximately 70 days later, and thus could have included *Blakely*, and taken advantage of *Booker*? There is no rational distinction between these individuals. There is only the luck of timing.

Therefore, with regard to similarly situated litigants within the Eleventh Circuit, he is denied equal protection of the law.

But it is also true that, compared to similar litigants in other jurisdictions, he is being treated substantially differently, for no rational reason. As noted by Judge Tjoflat in his dissent from denial of *en banc* in *United States v. Levy*, *supra*, 391 F.3d 1327, 1340:

> "This continues to be the only Circuit in which 'cases are entitled to the benefit of the intervening decision *only* if: (1) the case was not yet final at the time of the intervening decision; *and* (2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's brief on appeal.'" (Emphasis in original).

Particularly in view of the concerns expressed by the district court judge in this case regarding the inadequacy of the guidelines to take into account personal characteristics, the due process and equal protection issues here argue strongly in favor of a modification of the initial brief rule. The issue is particularly compelling here because this court like every other Circuit, had concluded that *Apprendi* did not apply to the guidelines.

Chambers' predicament, therefore, arises because of a lack of prescience and the serendipity of timing. The quality of criminal justice should hardly hang on such thin threads.

For these reasons, it is suggested that it is appropriate for the court to consider the applicability of the initial brief rule in cases in which retroactive application of a new rule has been ordained, and, particularly, where the Circuit has previously unequivocally rejected the issue.

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